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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN and LYCOMING TRUST COMPANY, Trustee

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR RESPONDENT

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MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a Writ of Certiorari in this case.

The petition is based chiefly upon a conflict between the decision of the Court of Appeals of the Third Circuit and prior decisions of the Courts of the Fourth and Ninth Circuits in Ness vs. Mutual Life Insurance Company of New York, 70 F. (2d) 59, and Mutual Life Insurance Company of New York vs. Markowitz, 78 F. (2d) 396 respectfully, on the first question raised by the petitioner.

This conflict was recognized by the Court of the Third Circuit in its decision in this case and also in its decisions in New York Life Insurance Company vs. Gatti and New York Life Insurance Company vs. Ruhlin decided on the same day as this case and not yet reported. The Third Circuit came to a conclusion contrary to that reached in the Fourth Circuit and the Ninth Circuit.

While we believe the conclusion so reached in this case by the Third Circuit is correct and based upon sound reasoning, we admit that it is contrary to that reached in the Fourth and Ninth Circuits and believe that a review of the question by this Court is desirable. For that reason we do not oppose the granting of the Certiorari.

The foregoing applies only to the first question raised by the petitioner with reference to Policy No. 3, page 7 of the petition. As to the other questions involved in the case on Policies Nos. 1 and 2, there is, so far as we know, no conflict between Circuits.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 599.

CARL F. STROEHMANN, *et al.*, *Petitioners,*

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR MUTUAL LIFE INSURANCE CO.

The New York Ins. Law § 101 specifically authorized the Mutual Life to except from its compulsory "incontestable" clause, all the provisions of the policy relating to Disability Benefits.

The Mutual Life did so; and it was, therefore, entitled to a decree rescinding and cancelling so much of a life insurance policy as related to Disability Benefits, notwithstanding the expiration of the so-called one-year contestable period.

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JURISDICTIONAL AUTHORITY: Judicial Code § 240(a), as amended by Act of February 3, 1925.

STATUTES INVOLVED: § 101(2) Insurance Law, New York (L. 1923, ch. 28, § 1; Appendix, p. *infra*).

DATE OF JUDGMENT: July 2, 1935 R. 159 (D. C.); October 6, 1936 R. 179 (C. C. A.).

NATURE OF THE CASE, RULINGS, ETC.; Mutual Life sued to rescind and cancel a life insurance policy's "Disability Benefit" provisions only, on the ground of false fraudulent and material misrepresentations in their obtention (R. 3-19).

District Court dismissed the Bill of Complaint upon the ground that (as the suit was brought *more than one year* after the policy's date of issue) the "incontestable" clause barred the suit, following *Ness* v. *Mutual Life*, 70 F. (2d) 59, (C. C. A. 4th), and *Mutual Life* v. *Markowitz*, 78 F. (2d) 396, (C. C. A. 9th) [R. 158].

C. C. A.(3rd) *reversed* the District Court; declined to follow the *Ness* and *Markowitz Cases*, and held that the "incontestable" clause as authorized by § 101 New York Ins. Law *did not apply at all* to Disability Benefits (*Mutual Life* v. *Stroehmann*, 86 F. (2d) 47; R. 174-179).

IN THE

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OCTOBER TERM, 1936—No. 599

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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR MUTUAL LIFE INSURANCE CO.

The sole question involved is whether (despite the policy's *exception* italicized below*) the one year "incontestable" clause applies to the "Disability Benefits" provided for in Stroehmann's policy; and thereby prevents Mutual Life from rescinding such "Disability Bene-

* The Stroehmann policy provided (R. 135):

"**Incontestability**.—Except for non-payment of premiums and *except for the restrictions and provisions applying to the* Double Indemnity and *Disability Benefits as provided in Sections* 1 and *3* respectively, this Policy shall be incontestable after one year from its date of issue . . ." (R. 135).

fits", notwithstanding the gross fraud that Stroehmann perpetrated in order to obtain the policy.

Only a few weeks ago, this Court, in *American Life Ins. Co.* v. *Stewart*, 299 U. S. (February 1, 1937), pointed out the extent to which some courts have gone in enforcing incontestable clauses; and then gave this significant warning:

> "To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression."

The C. C. A. (3rd, 5th, and apparently 1st and 10th), various District Courts, all the New York Courts [and the great weight of authority in other State Courts] hold that such an incontestable clause *does not apply at all* to "Disability Benefits"; while, on the other hand, the C. C. A. (4th and 9th) [and a small minority of State Courts] hold that it *does* so apply (p. 24, *infra*).

RELEVANT STATUTES

Since 1906, the New York Insurance Law, § 101, has required every policy to contain, in substance, certain "Standard provisions". The standard provision (as amended from time to time) for an "incontestable" clause, is given in the Appendix (p. 31, *infra*).

Since 1923, § 101 required each policy to contain, in substance, the following provision—the black faced type indicating the words first added by the 1923 amendment:

> "A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue

except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war **and at the option* of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted"** (L. 1923, ch. 28, § 1).

STATEMENT OF THE FACTS

1. For nearly *thirty years* (1903-1930), Stroehmann was almost continuously under treatment by numerous doctors, surgeons and medical specialists at his residence and in hospitals, in West Virginia, Pennsylvania and Germany, for the following illnesses and surgical operations;

(*a*) Typhoid fever, pneumonia, rheumatism, influenza, tonsilitis, sinus trouble, typhoid-rheumatism, indigestion, nervousness, cramps, visceropotosis, spasms of larynx, and throat ailments;

(*b*) Broken ribs, contusions of kidney followed by hematuria, concussion of brain, and adhesions;

(*c*) At Wheeling, W. Va.; Williamsport, Norristown and Philadelphia, Pa.; Berlin, Frankfort and Black Forest, Germany;

(*d*) At hospitals and a sanitarium in Pennsylvania and in Germany;

(*e*) By Doctors MacGregor, Hardt, Little and Whalen;

(*f*) Operations for tonsillectomy and adhesions;

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* The 1923 Amendment gave this "option" to the company, because certain companies issued policies with *both* Disability Benefits and Accidental Death Benefits; some companies did not issue them at all; and other companies issued only one, or the other, form of Benefits, but did not issue both forms.

(*g*) Other illnesses, diseases, injuries, surgical operations and medical attendance between 1925-1930

—all as chronologically summarized in the margin.*

2. On June 25, 1930, Stroehmann (a manufacturing baker aged 34 years) applied to Mutual Life for $40,000 ordinary life insurance, with "Double Indemnity", and with Level, Increasing and Waiver of Premium "Disability Benefits" (R. 108-110).

In the application, he was specifically asked to tell what illnesses, injuries, diseases and surgical operations

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* 1903—Typhoid fever (R. 10).
1904—Pneumonia (R. 10).
1912—Rheumatism; two attacks (R. 10).
1914—Broken ribs; contusions of right kidney, followed by hematuria (R. 11).
1916—Concussion of the brain (R. 11).
1918—Influenza, resulting in sinus trouble lasting for ten years (R. 10; 14-15).
1922—Typhoid-rheumatism, tonsilitis and tonsillectomy (R. 11).
1923—Influenza (R. 11).
1925-1928—Headaches, mental sluggishness, indigestion, nervousness, cramps in stomach and run-down condition (R. 11-12).
1926—Visceroptosis (R. 11).
1928—Adhesions and operation therefor (R. 15).
1929—Spasms of the larynx, colds and nervousness (R. 15).
1930—Two months' confinement in bed; throat ailments; medical treatment in Germany (R. 15-16).
1925-1930—Other illnesses, diseases, injuries, surgical operations and medical attendance (R. 16).

Places: Wheeling, W. Va.; Williamsport, Norristown and Philadelphia, Pa.; Berlin, Frankfort and Black Forest, Germany (R. 11, 15, 16).

Hospitals: Wheeling Clinic, Williamsport Hospital, Sanitarium in Germany (R. 11, 15).

Doctors: MacGregor, Hardt, Little, Whalen and medical specialists in Germany (R. 11, 16).

As the District Court sustained a motion to dismiss the Amended Bill of Complaint, the facts as alleged therein must be taken as true (R. 159).

he had had; the names, addresses, etc., of every physician or practitioner who had prescribed for or treated him, or with whom he had consulted, in the preceding five years; the dates of consultation, injury or complaint, duration, effects, etc.; whether he had ever been at any cure, hospital or sanitarium; and whether he had been under any medical or other treatment or medical observation within the preceding one year (R. 112, 114).

To those searching questions, Stroehmann gave only the following scanty information, to-wit (R. 141-2):

> 1925; Appendectomy; one attack, lasting 24 days; complete recovery, with no complications or remaining effects,
>
> 1929; Dr. Drick, Williamsport, Pa., for Coryza. He expressly denied ever having been in any cure, hospital or sanitarium, except the above appendectomy in 1925 (R. 143).

The foregoing representations were false; Stroehmann knew them to be false; as a matter of law, they constituted concealments and misrepresentations material to the risk; and if known, they would have prevented the issuance of the policy (R. 11-12, 14, 16-17). Being unknown, in the event of discovery *within* the one year contestable period, they would have supported a decree for the cancellation and rescission of the entire policy or have defeated a suit at law.*

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* *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 306; *Mutual Life Ins. Co.* v. *Hilton-Green*, 241 U. S. 613, 622-624; *Stipcich* v. *Ins. Co.*, 277 U. S. 311, 316-317, and cases there cited; *Enclow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379, 384; *American Life Ins. Co.* v. *Stewart* (No. 440, October Term 1936), decided Feb. 1, 1937,———U. S.———, and authorities there cited; Cf. *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178, 180.

3. On June 30, 1930, in entire ignorance of those flagrant misrepresentations and concealments, Mutual Life issued and delivered to Stroehmann its $40,000 policy, which also provided for a $400 monthly income (increasing to $600 and then to $800 a month) in the event of total permanent disability (R. 6-7, 119, 125).*

About October 11, 1932, Mutual Life first discovered Stroehmann's thirty years' medical and surgical history; immediately filed a Bill of Complaint (*a*) to rescind and cancel the "Disability Benefit" provisions on the ground of Stroehmann's fraud and (*b*) to enjoin any suit at law upon the "Disability Benefit" provisions (R. 11, 12, 16-18).

4. The DISTRICT JUDGE at first sustained the Bill of Complaint on the ground that the incontestable clause *did not apply* to the "Disability Benefits" (*Mutual Life Ins. Co.* v. *Strochmann,* 6 F. Supp. 95; R. 160-168); but, later, he felt constrained to follow the contrary opinions of the C. C. A. (4th and 9th, respectively) in *Ness* v. *Mutual Life Ins. Co.,* 70 F. (2d) 59, and *Mutual Life Ins. Co.* v. *Markowitz,* 78 F. (2d) 396 (reported after his original decision); and, on their authority, he dismissed the Amended Bill of Complaint (R. 158).

On appeal, the C. C. A. (3rd) declined to follow the 4th and 9th Circuits; and on the authority of its own recent opinion in *New York Life Ins. Co.* v. *Gatti,* ——F. (2d) ——, p. 20, *infra* (decided Oct. 6, 1936, not yet officially reported), it *reversed* the District Court (R. 174-179).

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* Shortly before October 11, 1932, Stroehmann claimed that he was totally and permanently disabled, and demanded payment of that large monthly disability income (R. 17).

Certiorari was granted because of this conflict between the 3rd, 4th and 9th Circuits; but it was "limited to the question of the application and effect of the incontestability clause in policy No. 4,361,192" (R. 180).

* * * * * *

The expression "Disability Benefits" (used many times in Stroehmann's policy) always refers to the benefits granted in the event of his becoming "totally and presumably permanently disabled before age 60".

For brevity, the words "disability" or "disabled" as used in this Brief are to be understood as referring to "total and permanent disability before age 60".

SUMMARY OF POINTS DISCUSSED

1. Insurance Law § 101(2) as amended in 1923, authorized any insurance company to frame its "incontestable" clause so as to enable it to resist a suit for "Disability Benefits" on the ground that the policy was originally obtained by fraud, no matter how many years may have elapsed since the policy was issued (pp. 8-13).

2. Mutual Life had the right to rescind and cancel Stroehmann's Disability Benefits (notwithstanding the expiration of the one-year contestable period), because—under the statutory option granted by § 101—Mutual Life excepted the provisions for Disability Benefits from the "incontestable" clause (pp. 13-29).

FIRST POINT

Insurance Law § 101(2) as amended in 1923, authorized any insurance company to frame its "incontestable" clause so as to enable it to resist a suit for "Disability Benefits" on the ground that the policy was originally obtained by fraud, no matter how many years may have elapsed since the policy was issued.

The New York Courts, and all the State and Federal Courts which have considered the question, unanimously hold that under the 1923 amendment to § 101, a company can so frame its "incontestable" clause as to enable it to resist a suit for (or to sue to cancel) Disability Benefits, on the ground that the policy was obtained by false and fraudulent misrepresentations, even though such defense is not asserted (or such suit brought), until long after the balance of the policy has become incontestable (See cases collated in the margin*).

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* *Ness* v. *Mutual Life*, 70 F. (2d) 59, 61 (C. C. A. 4th); *Pyramid Life* v. *Selkirk*, 80 F. (2d) 553, 554 (C. C. A. 5th); *New York Life* v. *Gatti*, F. (2d) (C. C. A. 3rd); *Mutual Life* v. *Stroehmann*, 86 F. (2d) 47, 49 (C. C. A. 3rd); *Kaffanges* v. *New York Life*, 59 F. (2d) 475; *New York Life* v. *Davis*, 5 F. Supp. 316, 319; *Penn Mutual* v. *Joseph*, 5 F. Supp. 1003, 1004; *Connecticut General* v. *Brandstein*, 233 App. Div. 723; *Chambers* v. *New York Life*, 148 Misc. 561, 240 App. Div. 1027; *Steinberg* v. *New York Life*, 263 N. Y. 45, 47; *Guardian Life* v. *Katz*, 243 App. Div. 11, 14, aff'd. 269 N. Y. 625; *Mutual Life* v. *Union Trust Co.*, 244 App. Div. 764; *Mutual Life* v. *Levine*, App. Div. ; N. Y. Law Journal Jan. 16, 1936, at p. 282, and Feb. 13, 1937, at p. 754; *Mutual Life* v. *McConnell*, 20 Pa. D. & C. 250; *New York Life* v. *Gresham*, 170 Miss. 211; *Smith* v. *Equitable Life*, 169 Tenn. 477; *Greber* v. *Equitable Life*, 43 Ariz. 1 COMPARE *Mutual Life* v. *Markowitz*, 78 F. (2d) 396, 397 (C. C. A. 9th); *New York Life* v. *Kaufman*, 78 F. (2d) 399, 404 (C. C. A. 9th); *Love* v. *Prudential Ins. Co.*, 173 S. C. 433; *Millis* v. *Continental Life*, 162 Wash. 555; *Paulson* v. *Montana Life*, 181 Wash. 526.

We might safely rest this point upon the authorities cited; but, in view of the reasoning of the C. C. A. (4th) and (9th), it will be useful to consider (1) just what an insurance company could do *before* the 1923 amendment, and then (2) just what additional power the amendment conferred upon insurance companies with respect to contesting fraudulent claims for Disability Benefits.

1. Even before the 1923 Amendment, an insurance company could always resist on the ground that the particular hazard or contingency insured against—whether death or disability—had not, in fact, occurred (*Matter of Met. Life Ins. Co.* v. *Conway*, 252 N. Y. 449, 452; *Smith* v. *Equitable Life*, 169 Tenn. 477); as, for example:

[A] That the insured had not *died*[1], or had not died *by accident*,[2] or had not become *disabled*[3]; or

[B] That the event which *actually did occur*, nevertheless *did not fall within the coverage terms of the policy*, as, for instance, that the insured (*a*) died in an airplane crash[4], duel, suicide[5], while intoxicated or violating the law[6], from injury inflicted by another[7], or from military or naval service[8], where the policy

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[1] *Northwestern Life* v. *Johnson*, 254 U. S. 96, 102.

[2] *Landress* v. *Phoenix Ins. Co.*, 291 U. S. 491; *Pope* v. *Prudential Ins. Co.*, 29 F. (2d) 185 (CCA 6th), and cases there cited.

[3] *Lumbra* v. *U. S.*, 290 U. S. 551, 558; *U. S.* v. *Spaulding*, 293 U. S. 498, 504-5.

[4] *Mayer* v. *New York Life*, 74 F. (2d) 118, and many cases therein cited.

[5] *Wright* v. *Phila. Life*, 25 F. (2d) 514; *Woodbery* v. *New York Life*, 129 Misc. 365, and cases there cited; *Myers* v. *Liberty Life*, 124 Kan. 191; *Childress* v. *Fraternal Union*, 113 Tenn. 252.

[6] *Flannagan* v. *Provident Life*, 22 F. (2d) 136; *Scarborough* v. *Amer. Nat. Ins.*, 171 N. C. 353; *Burt* v. *Union Central*, 187 U. S. 362; *Northwestern Mutual* v. *McCue*, 223 U. S. 324.

[7] *Sanders* v. *Jefferson Standard Life*, 10 F. (2d) 143.

[8] *Ruddock* v. *Detroit Life Ins. Co.*, 209 Mich. 638, and cases there cited.

excepted deaths from those causes from its liability; or (*b*) became disabled from a self-inflicted injury[1], or from military or naval service, or where the insured failed to furnish proof of loss within the time limited in the policy[2], where the policy *excepted from its coverage* disability arising from those named causes.

This is so because the policy did not promise to pay the benefits in the event death or disability resulted under those specified circumstances.

Consequently, when an insurance company relied upon the grounds specified in [**A**] and [**B**], the Courts have always* held (1) that such action was not a "contest" of the policy, but was a mere insistence that the policy itself did not bind the company to pay the insurance; and (2) that the company could always raise the question whether or not (*a*) the particular claim was *covered* by the policy, or (*b*) the insured had complied with the particular provisions or conditions entitling him (or the beneficiary) to the benefits sued for (*Conway Case,* 252 N. Y. 449; *Smith Case,* 169 Tenn. 477).

On the other hand, the "incontestable" clause prevented the company (after the expiration of the contestable period) from contesting or defending on the ground that the policy was invalid from its inception on account of fraud, concealments or misrepresentations made in its obtention, or that it became thereafter invalid by reason

[1] *Elwood* v. *New England Mutual,* 305 Pa. 505.

[2] *Ill. Bankers Life* v. *Byassee,* 169 Ark. 230; *Brady* v. *Prudential Ins. Co.,* 168 Pa. St. 645.

* There are a number of "suicide" cases collected in the annotations to 55 ALR 549 and 67 ALR 1364 seemingly to the contrary; but it is significant that they were all decided before the illuminating analysis of the subject in *Metropolitan Life Ins. Co.* v. *Conway,* 252 N. Y. 449.

of a condition broken, unless specifically excepted in the "incontestable" clause (*Conway Case, supra; United Sec. Life* v. *Massey,* 159 Va. 832; s. c. 164 S. E. 529, 167 S. E. 248 and many cases there cited on both hearings).

The foregoing review demonstrates that despite an "incontestable" clause, a company may always insist (1) that the admitted contingency insured against, *has not actually happened;* or (2) that some other contingency which *has* actually happened, is *not within the terms* of the policy's coverage.

2. Since the adoption in 1906 of the "Standard provision" for "incontestability", there have been successive *exceptions* introduced into it, to-wit: *"except* for non-payment of premiums" (L. 1906, ch. 326, p. 800); *"except* for violation of the conditions of the policy relating to military or naval service in time of war" (L. 1909, ch. 301, p. 563); *"after* it has been in force during the lifetime of the insured for a period of" two years (L. 1921, ch. 407, § 1).

In 1923, the Legislature added a *further exception* to the "incontestable" provision of § 101, in these words:

> " . . . and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident *may also be excepted"* (L. 1923, ch. 28, p. 28).

The Legislature thereby gave to each insurance company "the option" to *except* from the required "incontestable" clause, all of the policy's,

> "provisions relative to benefits in the event of total and permanent disability . . ."

By thus authorizing the *exception* from the "incontestable" clause, of **"provisions relative to benefits in the event of total and permanent disability"**, the Legislature empowered the company, at its option, to remove from the operation of the "incontestable" clause all of the **provisions** relating to "Disability Benefits".

3. As a mere matter of *statutory construction*—and that is all we are now concerned with—it is plain that § 101(2) authorized every insurance company to *except* from its "incontestable" clause, all the provisions of the policy relating to Disability Benefits.

Omitting, for brevity and clarity, the previously authorized exceptions regarding non-payment of premiums, military or naval service, etc., in 1923 the Legislature authorized any insurance company to adopt an "incontestable" clause reading as follows:

> "*Except* for the **provisions** relative to benefits in the event of total and permanent disability, this policy shall be incontestable after two years from its date of issue";

Or, in the equivalent alternative form (following the language of the statute):

> "This policy shall be incontestable after two years from its date of issue, *except* for the **provisions** relative to benefits in the event of total and permanent disability."

Suppose a company had used either of those forms embodying the precise statutory language in its "incontestable" clause. It would mean that the "incontestable" clause *did not apply* to the provisions for Disability Benefits. It meant that, and nothing else. If it did not mean that, what did it mean? If it did not mean that, the English language has lost its meaning.

In the absence of an "incontestable" clause, a company may always resist suit on a policy, or sue to cancel it, because of false and fraudulent material misrepresentations in the application (p. 5 note, 8, *supra*). § 101, *as amended*, gave each company the option of *excepting* from the "incontestable" clause, the Disability Benefit provisions, so that it might defend against, or cancel, the Disability Benefit provisions, on the ground of fraud in their original obtention.

Did the Mutual Life fully exercise that option in the "incontestable" clause in Stroehmann's policy? With forty-eight States involved, language had to be selected to conform to all requirements (Cf. Laws of Illinois 1921 p. 482, July 2, 1921; p. 32, *infra*).

SECOND POINT

Mutual Life had the right to rescind and cancel Stroehmann's Disability Benefits (notwithstanding the expiration of the one-year contestable period), because —under the statutory option granted by § 101—Mutual Life excepted the provisions for Disability Benefits from the "incontestable" clause.

If Stroehmann became disabled before age 60, Mutual Life agreed, under the marginal heading "Disability Benefits", (1) to waive all premiums and (2) to pay him $400 monthly income [increasing to $600 and $800 per month] during his disability,

> "all upon the conditions set forth in Section 3" (Policy, Page 1, R. 119).

Section 3 defines disability and the conditions for the increased income; provides that Disability Benefits shall not be granted as the result of self-inflicted injuries, and will terminate in the event of military or naval service in time of war outside of the United States, etc. (Page 3, R. 124-126).

The Mutual Life's "incontestable" clause reads as follows (R. 135):

> **"Incontestability.**—Except for non-payment of premiums and **except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3** respectively, this Policy shall be incontestable after one year from its date of issue . . ."

Typical forms of "incontestable" clauses, exempting Disability Benefits therefrom (adopted by other Companies under the option in § 101) are given in the margin.*

Even the 3rd, 4th and 9th Circuits agree that those small variations in language mean the same thing (*Stroehmann Case,* 86 F. (2d) 47, 49; *Verys Case,* 80 F. (2d) 264; *Kaufman Case,* 78 F. (2d) 398, 403).

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* NEW YORK LIFE (78 F. (2d), p. 402):

> **"Incontestability.**—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and *except as to provisions and conditions relating to Disability* Benefits."

CONNECTICUT GENERAL:

> "This policy shall be incontestable after . . . two years . . . *except as to provisions and conditions relating to benefits in the event of total and permanent disability.* . . ."

EQUITABLE LIFE ASSURANCE SOCIETY (169 Tenn. 477):

> "This policy, *except as to the provisions relating to Disability and Double Indemnity,* shall be (a) INCONTESTABLE after it has been in force . . . one year. . . ."

New York: The Courts hold that those excepting clauses of the Mutual Life, New York Life, etc., permitted the Company (even after the expiration of the one or two year "contestable" period) to defeat, or to sue to cancel, the Disability Benefits, on the ground of false representations in the original application.

For example, in *Chambers* v. *New York Life,* 148 Misc. 561, aff'd. 240 App. Div. 1027, the Court said:

> "The defendant [New York Life] by its counterclaim seeks to rescind that part of the policy which provides for disability and double indemnity. . . . The policies specifically except the incontestability for double indemnity and disability, and this exception is authorized by section 101, subdivision 2, of the Insurance Law. The law was amended in 1923 (Chap. 28) to cover the situation here involved, and the statute is effective to contracts issued after that date having such exception specified in the policy. I cannot agree with the plaintiff's [Chambers] theory that the contract here is but one **in view of the statutory sanction given to life insurance companies to except from the incontestability clause the double indemnity and disability benefits.** It will be observed that the policy in suit specifically shows the charge each year for double indemnity and disability benefits, so that it is not only possible but practicable to eliminate the benefits for which the plaintiff paid in the event that a final determination shall find that fraud and misrepresentation were practiced upon the defendant."

In *Steinberg* v. *New York Life,* 263 N. Y. 45, the Company was permitted to defend a suit for Disability Benefits, notwithstanding the expiration of the contestable period, the Court saying:

> "The two-year incontestable clauses contained in the policies prevent any defense as to the ordinary

life insurance provisions in the policies, **but do not apply to the disability and double indemnity benefits."**

In *Mutual Life* v. *Levine*, —— App. Div. —— (N. Y. Law Journal, Jan. 16, 1936, p. 282, Feb. 13, 1937, p. 754), the incontestable clause was exactly the same as in Stroehmann's policy. Six years after the policies were issued, the Mutual Life sued (as here) to rescind and cancel the Disability Benefits, on the ground of false representations in the application. The decree struck from the policies all of the provisions for Disability Benefits on the authority of *Guardian Life* v. *Katz*, 243 App. Div. 11 (aff'd. 269 N. Y. 625, 270 N. Y. 546), wherein the "incontestable" clause excepted "provisions relative to benefits in the event of total and permanent disability", with respect to which the Court said:

> "By the terms of the contract of insurance the right to contest, by action for a rescission or otherwise, the enforcibility of the disability benefit provisions is expressly reserved to the company, notwithstanding the lapse of the one-year period. Similar provisions have been construed and upheld." (Citations omitted.)

To the same effect, see *Mutual Life* v. *Union Trust Co.*, 244 App. Div. 764; *Mutual Life* v. *Lipman*, N. Y. L. J. April 7, 1933, p. 2072; *Mutual Life* v. *Zweifach*, N. Y. L. J. May 19, 1936, p. 2559; *Connecticut General Life* v. *Brandstein*, 233 App. Div. 723; *Connecticut Mutual Life* v. *Hirsch*, 240 App. Div. 816.

The foregoing authorities establish that Insurance Law, § 101, as amended, authorized insurance companies to except Disability Benefits from the "incontestable"

clauses; and that the Mutual Life's form of such exception (which is the same as used in Stroehmann's policy) *completely accomplished that result*—just as effectively as the slightly different language used by the New York Life, Connecticut General, Guardian Life and Connecticut Mutual accomplished a like result, by permitting them all to rescind and cancel Disability Benefits after the expiration of the ordinary contestable period.

As the law of New York, where the statutory exception was authorized, and the law of Pennsylvania, where the policy was delivered to Stroehmann (*Mutual Life* v. *McConnell,* 20 Pa. D. & C. 250 (1933)), agree as to the effect of the exact "incontestable" clause used in Stroehmann's policy, this Court, without going further, might well accept the rule in New York and Pennsylvania as final (*Mutual Life* v. *Johnson,* 293 U. S. 335, 339).

State Courts: The leading case is *Smith* v. *Equitable Life,* 169 Tenn. 477, where the Equitable Life's "incontestable" clause used the words "except as to the provisions relating to Disability" (p. 14, note, *supra*). The Court held that the company was entitled to a cancellation of the Disability Benefits on the ground of false representations in the application, although the policy had been in force more than two years, saying:

> "The language for construction (condensed by omitting matter not relevant to the issues under consideration) is: 'This policy except as to the provisions relating to disability * * * shall be incontestable after', etc. How can it be said, in the face of this quite definite excepting language, that it was intended to declare the policy to be incontestable as to its provisions for disability? The phrase 'relating to' is the equivalent of

pertaining to, having reference to (Webster's New International), terms that are comprehensive of the subject indicated.

As we understand the argument made for the insured, it is that the exception should be construed to apply, not to the general obligation, as a whole, to pay disability insurance, but only to the right to deny liability because certain prescribed conditions of liability applicable to claims arising under these heads have not been complied with, such as, under a claim for total and permanent disability, giving of notice and filing of proofs thereof within stipulated periods, or because the disability has resulted from military or naval service, or from self-inflicted injury. It is said that it was to preserve to the society the right to contest touching these matters after one year that the exception was inserted.

We think it apparent that the confusion which seems to have arisen in this case, and in several of those relied on for the insured, is due to a failure to appreciate the distinction between 'a denial of *coverage* and a defense of *invalidity*' which Chief Justice CARDOZO, when on the Court of Appeals of New York, so clearly emphasized in his opinion in *Metropolitan Life Ins. Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642. In that case he said: [Quotation omitted].

There could be no possible necessity for the insertion of a clause reserving by exception the right to contest a claim for payment based on disability on the ground that the claim did not come within the terms of coverage, that is, the conditions upon and under which the insurance was to be paid, for example, a showing that the disability was total and permanent, and was not self-inflicted. Such rights of defense are never affected by time limitations relating to the execution of the contract, or issuance of the policy, but arise

only and may be asserted whenever claims are made under the contract."

After reviewing at length the *Ness, Markowitz, Kaufman and Kiriakides* cases (pp. 24-29, *infra*), and the contentions there made that the exception related only to certain minor provisions and not to the Disability Benefits as a whole, the Court said:

"We think it too plain for argument that every one of these provisions or conditions, are with respect to matters as to which the *exception* as to incontestability *could have no sort of reference.* Every one of the items enumerated relate to matters of coverage, conditions of the contract to pay which the company could, of course, rely upon consistently with recognition of the validity of the contract of insurance and without respect to any limitation upon contestability. See *Scales* v. *Jefferson Standard Life Insurance Co.,* 155 Tenn. 412, and cases therein reviewed, in which the distinction is made clear between the right to contest for invalidity and the right to deny liability for violation of, or noncompliance with, the conditions of the risk assumed."

To the same effect, see *New York Life* v. *Gresham,* 170 Miss. 211; *Greber* v. *Equitable Life,* 43 Ariz. 1; *Love* v. *Prudential Ins. Co.,* 173 S. C. 433; *Millis* v. *Continental Life,* 162 Wash. 555; *Paulson* v. *Montana Life,* 181 Wash. 526.

C. C. A. Cases*: The FIRST CIRCUIT (*Kaffanges* v. *New York Life,* 59 F. (2d), 475) held, without discussion,

* Two District Courts cases, *New York Life* v. *Davis,* 5 F. Supp, 316, and *Penn Mutual Life* v. *Joseph,* 5 F. Supp. 1003, 1004, are to the same effect as the State cases above reviewed.

that a New York Life policy [with the same "incontestable" clause involved in the other New York Life cases cited in this Brief].

> "contained the incontestable clause as to death benefits, but not as to the disability provisions".

The THIRD CIRCUIT held that the "incontestable" clauses used by the New York Life and Mutual Life, respectively, were "substantially the same"; and that where false representations had been made in the application, the companies were entitled to a cancellation of the Disability Benefits contained in the policies, even though in the case of the New York Life, nearly ten years, and in the case of the Mutual Life, more than two years, had elapsed since the policies were issued.

In *New York Life* v. *Gatti*, ——F. (2d)——, the Court said:

> "The United States Circuit Court of Appeals for the Fifth Circuit in the case of *Pyramid Life Insurance Co.* v. *Selkirk*, 80 Fed. (2d) 533, held that the insured had the right to rescind for fraud the provisions relating to disability and double indemnity benefits in a contract of insurance containing an incontestability clause substantially the same as the one in the case at bar.
>
> The United States District Court for the Western District of Pennsylvania in the case of *New York Life Insurance Company* v. *Davis*, 5 Fed. Sup. 516 reached the same conclusion. So have the state courts in the states of New York, Connecticut, Pennsylvania, Maryland, Mississippi, Arizona, Washington and Tennessee.
>
> We are concerned here with the 'provisions and conditions' relating to disability. Leaving out the

parts not material here, the excepting clause reads: 'This policy shall be incontestable after two years from its date of issue . . . except as to provisions and conditions relating to disability benefits'. It was clearly the purpose of the Insurance Company to except the provisions creating the obligation to pay these benefits from the incontestable provisions obligating it to pay insurance on the life of the insured. The policy clearly sets out the provisions and conditions relating to disability benefits and in definite and comprehensive language the excepting clause excludes these from the incontestability provisions.

But the United States Circuit Court of Appeals for the Fourth Circuit in the cases of *Ness* v. *Mutual Life Insurance Company of New York,* 70 Fed. (2d) 59 and *New York Life Insurance Company* v. *Truesdale,* 79 Fed. (2d) 481, and the Circuit Court of Appeals for the Ninth Circuit in the cases of *Mutual Life Insurance Co. of New York* v. *Markowitz,* 78 Fed. (2d) 396 and *New York Life Insurance Company* v. *Kaufman,* 78 Fed. (2d) 398 together with one or two state courts have reached a contrary conclusion. They hold that the exception in the incontestability clause applies to the *'provisions and conditions'* relating to disability and double indemnity benefits and not to the benefits themselves. For this reason, they say, the insurance company may not defend against a claim for disability benefits on the ground of fraud practiced in the procurement of the insurance if the period of limitation has expired.

We think this construction is untenable for two reasons:

1. The company may always, without an exception in the incontestability clause, contest the question as to whether or not a particular claim is covered by the policy. The question is purely one of coverage.

That is, whether or not the insured has complied with the particular provisions or conditions entitling him to benefits. *Metropolitan Life Assurance Co. v. Conway*, 252 N. Y. 449; *Smith v. Equitable Life Assurance Society*, 169 Tenn. 477.

2. The exception here does not intend to distinguish between the 'provisions and conditions' relating to benefits and the benefits themselves. These terms, 'provisions and conditions', are comprehensive of the subject to which they relate. *Smith v. Equitable Life Assurance Society, supra.* The expression 'provisions and conditions relating to disability benefits' even if tautological, embraces all matters relating to liability for such benefits. When these terms are combined nothing else relating to liability for disability benefits remains for consideration. Both are excepted from the operation of the incontestability clause. *Pyramid Life Insurance Co. v. Selkirk, supra.* The language is clear and definite and the parties perfectly well understood it or with ordinary intelligence should have understood it. The exception is stated in such language as not to permit a person deliberately to misrepresent the facts and practice fraud on the company for his personal advantage and then hide behind a refined construction of the language employed."

In *Mutual Life v. Strochmann*, 86 F. (2d) 47, 49, the Court reached the same conclusion, and said (R. 179):

"In *New York Life Insurance Co. v. Gatti*, and *New York Life Ins. Co. v. Ruhlin*, —— Fed. (2d) —— (recently decided), where the incontestability clause was *substantially the same* as the one quoted above [Mutual Life's], we held that the insurer not only had the right to contest liability under the double indemnity and disability provisions, but also the right to have those provisions rescinded in case of fraud, even though the

period of limitations set forth in the incontestability clause had run if a suit at law had not previously been instituted. **The incontestability clause would be meaningless and purposeless if we confine the appellant's right to contest liability thereunder to the limits of coverage set forth in sections 1 and 3. New York Life Insurance Co. v. Gatti, supra. That right it has without the excepting clause."**

The FIFTH CIRCUIT, in *Pyramid Life Ins. Co.* v. *Selkirk*, 80 F. (2d) 553, held that the insurance company had the right to cancel the Disability provisions from a life insurance policy, on the ground of fraud in the application, even though five years had elapsed since the policy was issued. The one year "incontestable" clause involved was exactly the same as that used by the New York Life (p. 14, note, *supra*); and the exception read "except as to *provisions and conditions* relating to Disability Benefits". The Court said:

"The effect of this exception, it seems to us, is to *exclude from the one-year limitation* of the incontestability clause, **all grounds of contest relating to liability for disability benefits,** not merely those based on conditions enumerated in the rider, leaving open to contest after one year the question of fraud in procuring the disability benefit contract [six citations omitted].

The expression, 'provisions and conditions relating to disability benefits,' even if tautological, embraces all matters relating to liability for such benefits; those which create the right to receive them, as well as those which will defeat the right. When the terms 'provisions' and 'conditions' are combined, nothing else relating to liability for disability benefits remains to be referred to, and both are excepted from the operation of this in-

contestability clause. It might have been briefer to have said, as suggested by appellee [Selkirk], that the policy is incontestable after one year 'except as to liability for disability benefits'. **But it would have been no more comprehensive.** Moreover, one of the 'provisions' relating to disability benefits is the promise of the insurer to pay them, made in reliance upon the insured's application which forms a part of the policy and in which the false representations are alleged to have been originally made. The 'provision' containing this promise is excluded from the protection of the incontestability clause and leaves such promise open to rescission for fraud in its procurement."

Contra Authorities Sustaining Stroehmann's Contention

The THIRD CIRCUIT, in *Ness* v. *Mutual Life*, 70 F. (2d) 59 (followed without further discussion in *New York Life* v. *Truesdale*, 79 F. (2d) 481, and *New York Life* v. *Yerys*, 80 F. (2d) 264, holding that the New York Life's "incontestable" clause was not materially different from that of the Mutual Life—all three opinions delivered by Judge Parker) apparently conceded (p. 61) that *if* the exception had been *phrased differently*, Disability Benefits could have been excluded from the operation of the "incontestable" clause; but that neither the Mutual Life's nor the New York Life's language was broad enough to accomplish that result.

The Court held that the exceptions of "the restrictions and provisions applying to the Disability Benefits as provided in Section 3" (*Ness case*) and "as to provisions and conditions relating to Disability Benefits" (*Truesdale*

and *Yerys cases*) were some thing very different from the statutory § 101 authorization of an exception of the "provisions relative to benefits in the event of total and permanent disability".

The Court said:

"The purpose of the second exception [*re* Disability Benefits] in the incontestability clause was to make clear that, notwithstanding the provisions of that clause, the company reserved the right to rely upon the restrictions and provisions contained in sections 1 and 3. . . . And the right was reserved to contest, under section 3, claims for disability where due proofs had not been furnished, or where upon request of the company proofs of the continuance of the disability had been refused, or where the disability resulted from self-inflicted injury or from military or naval service beyond the continental limits of the United States and Canada. . . . If it had been the intention of the company that the right to contest liability for double indemnity or disability benefits should not be affected by the incontestability clause it would have been easy enough to use language making that intention clear, as by simply wording the second exception to the incontestability clause to read: 'Except as to liability for double indemnity or disability benefits.' . . . The incontestability clause was directed at defenses which might be asserted to the policy. The exception which we are considering was clearly intended to except certain defenses from the operation of that clause; and, equally clearly, the defenses so excepted were those enumerated in the sections to which specific reference was made, *i. e.* sections 1 and 3. These Sections provide the restrictions and provisions under which the promise with respect to double indemnity and disability made in the face of the policy are to be enjoyed. And the second exception in the incontestability clause preserves de-

fenses arising out of these restrictions and provisions against the general effect of the clause. It is to be noted that the exception is, not as to the double indemnity and disability benefits, but as to 'restrictions and provisions applying to the double indemnity and disability benefits'."

To those views, we reply:

(1) They are fully answered in *Pyramid Life* v. *Selkirk*, 80 F. (2d) 553, 554, p. 23, *supra; New York Life* v. *Gatti*, — F. (2d) — p. 20, *supra* and in *Smith* v. *Equitable Life*, 169 Tenn. 477 (p. 17, *supra*), wherein it is also pointed out that Judge Parker "overlooked the distinction emphasized by Chief Justice Cardozo between a denial of coverage and a defense of invalidity", and that the *Kiriakides* case overlooked the same distinction.

(2) The defense which Judge Parker says the Mutual Life *attempted* to preserve, were all preserved to it anyway, without any exception in the "incontestable" clause.

(3) Judge Parker was in error when he said that the Mutual Life "clearly intended to except certain defenses", which "defenses so excepted were those enumerated in Section 3." The Mutual Life was not trying to "except" *defenses;* but only to provide that the policy should be incontestable "*except* for the restrictions and provisions applying to the Disability Benefits as provided in Section 3".

Judge Parker's paraphrase is not the equivalent of the language itself.

(4) The Mutual Life agreed to pay to Stroehmann certain "Disability Benefits" **"all upon the conditions set forth in Section 3"**: and that the policy should be incontestable **"except for the restrictions and provisions applying to the Disability Benefits as provided in Section 3".**

That language has been held by all the courts to be the *legal equivalent* of the language used by the other insurance companies, and especially that of the Equitable Life, *i. e.* "provisions relating to disability", which, in turn, is almost the precise language of § 101, *i. e.* "provisions relative to benefits in the event of total and permanent disability".

(5) Judge Parker has discovered a distinction [between the "option" granted in § 101, and the language used by the Mutual Life and by the New York Life] which is too refined for practical application.

When the "man in the street" reads the Mutual Life's promise to pay certain "Disability Benefits" "upon the conditions set forth in Section 3", and then that the policy is incontestable "except for the restrictions and provisions applying to the Disability Benefits as provided in Section 3" [which is the only place in the policy that Disability Benefits are provided for], he would understand that whatever provisions the policy did contain about Disability Benefits, were certainly excepted from the "incontestable" clause. And this is so because only by resorting to Section 3 can the provisions for Disability Benefits be determined.

The NINTH CIRCUIT, in three opinions by Judge Denman (*Mutual Life* v. *Markowitz*, 78 F. (2d) 396, *New York Life* v. *Kaufman*, 78 F. (2d) 398, and *Horwitz* v. *New York Life*, 80 F. (2d) 295), follows the *Ness* case.

As there are no arguments in the *Kaufman* case beyond those in the *Ness* case, it is unnecessary to review the *Kaufman* case, especially as Stroehmann's brief merely cites it with a casual quotation on a point not really involved.

Apparently the NINTH CIRCUIT is not in accord with the fundamental distinction between "coverage" and a

"defense of invalidity" (*Conway* case, 252 N. Y. at 452), which may explain the *Kaufman* decision wherein Judge Denman says (78 F. (2d) at 406):

> "It is true that there are decisions such as that of Judge Cardozo in *Metropolitan Life Ins. Co.* v. *Conway*, 252 N. Y. 449, holding that such provisions are descriptive details of the coverage and that a contest as to whether the insured's claim came within their limits would survive after the two-year period had elapsed. . . . Other courts have held similar provisions incontestable after the lapse of time bringing into effect the incontestability clause. *Royal Circle* v. *Achterrath*, 204 Ill. 549; *Sun Life Ins. Co.* v. *Taylor*, 108 Ky. 408; *Royal Americans of Republic* v. *Mayer*, 137 Ill. App. 574."

Instead of the *Royal Circle*, *Sun Life* and *Loyal Americans* cases being contrary* to Judge Cardozo's decision, they fall directly within his category that "within the limits of the coverage, the policy shall stand, unaffected by any defense that it . . . became invalid by reason of a condition broken". Judge Denman failed to distinguish between "a denial of coverage and a defense of invalidity" (*Conway* case, at 452).

The very fact that Judge Denman cited those cases as illustrative of a divergence from Judge Cardozo's opinion, when, in point of fact, they expressly fall within it, illustrates how completely Judge Denman misconceived the

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* In the *Royal Circle* case, the constitution of a fraternal order provided that if the member died in a duel or from suicide, his certificate should be void; and in the *Sun Life* case, the policy provided that it should be void if the insured died in consequence of his own criminal action.

As Judge Cardozo explained (p. 453), the "incontestable" clause "will sustain a recovery in the face of a forfeiting condition", but "It is quite another thing to say that the same facts will prevail against a refusal to assume the risk". It is that distinction which Judge Denman wholly failed to grasp.

necessity for the § 101 statutory exception to the "incontestable" clause.

State cases: *Kiriakides* v. *Equitable Life,* 174 S. C. 140, follows the *Ness* case with a very long quotation from it, but advances no additional reasons.

In *Wilson* v. *Equitable Life Ins. Co. of Iowa,* 220 Iowa, 321, the exception in the "incontestable" clause was very different from that of the New York companies. The case turned largely on the particular language used by the Iowa Company, although the argument is, in substance, the same that Judge Parker advanced in the *Ness* case.

In *Mutual Life* v. *Margolis,* —— Calif. ——, 53 Pac. (2d) 1017, the *Ness* case was fully reviewed and followed; but no additional argument was advanced.

Conclusion

In its last analysis, this Court must, *first,* determine whether it will follow the decisions of the New York Courts as to the effect of the "incontestable" clauses adopted under § 101; and, if it is not prepared to accept those decisions, then; *second,* construe for itself § 101 and the "incontestable" clauses adopted by the different companies, giving such weight as it thinks proper to the opposing arguments expressed in the *Pyramid Life, Gatti, Smith* and *Chambers* cases, on the ne hand, and in the *Ness* case, on the other; and, *third,* solve the conflict between the several Circuit Courts of Appeals.

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March 9, 1937

APPENDIX

History of New York's "Standard Provision" For an "Incontestable" Clause in Life Insurance Policies.

In 1906 following the Armstrong Investigation, "Standard forms" of policies were prescribed, which contained the following incontestable clause:

> **"Incontestability.** This policy shall be incontestable, except for non-payment of premiums [one or two years] from its date" (§ 101; L. 1906, ch. 326, § 37).

In 1909, § 101 was amended to require every policy to contain, in substance:

> "A provision that the policy shall be incontestable after two years from its date of issue except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war" (Insurance Law § 101; L. 1909, ch. 301, § 7).

§ 101 was further amended by the insertion in 1921 of the following italicized words, and in 1923 by the addition of the words in black faced type:

"A provision that the policy shall be incontestable after *it has been in force during the lifetime of the insured for a period of* two years from its date of issue except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war, **and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted"** (L. 1921, ch. 407 § 1; L. 1923, ch. 28, § 1; § 101 Insurance Law).

In 1921, Illinois had granted authority for an exception as follows;

> ". . . except as to *provisions and conditions* relating to benefits in the event of total and permanent disability and those granting additional insurance specifically against death by accident" (Laws of Illinois, p. 482; Act July 2, 1921).

SUPREME COURT OF THE UNITED STATES.

No. 599.—October Term, 1936.

Carl F. Stroehmann and Lycoming Trust Company, Trustee, Petitioners, *vs.* Mutual Life Insurance Company of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 29, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

By a policy dated June 30, 1930, respondent Insurance Company, a New York corporation, agreed to pay the named beneficiary $40,000.00 upon death of Carl F. Stroehmann, the insured. Or to pay $80,000.00 if his death results from accidental bodily injury, "all upon the conditions set forth in Section 1." "And if the Insured is totally and presumably permanently disabled before age 60, will pay to the Insured $400.00 monthly during such disability, increasing after five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3."

The policy is a long and complicated document. It incorporates the application and the Medical Examiner's report.

Section 1 (two printed pages) relates to the "Double Indemnity" obligation. It defines the injury to which the insurance applies, specifies the necessary proof, optional modes of settlement, etc.

Section 3—"Benefits in Event of Total and Permanent Disability before Age 60", is in the margin.[1] It defines total and per-

[1] "Section 3.—Benefits in Event of Total and Permanent Disability before Age 60.

"Total Disability.—Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful occupation.

"Permanent Disability.—Total disability shall, during its continuance, be presumed to be permanent;

"(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the Insured; or,

"(b) If such disability has existed continuously for ninety days.

manent disability; states when benefits will become effective; what they shall be; when premiums will be waived. Also specifies what will be considered permanent disability, when proofs may be demanded, etc. And provides: "Disability Benefits shall not be granted if disability is the result of self-inflicted injury. The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada." Other provisions relate to termination of such benefits, reduction of premiums thereafter, etc.

Neither Section 1 nor 3 contains anything relative to fraud in obtaining the policy or the effect of false statements in the application.

Section 14—"Miscellaneous Provisions" (two pages) contains the following paragraph: "Incontestability.—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as pro-

"When Benefits become Effective.—If, before attaining the age of sixty years and while no premium on this Policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.

"Benefits. (a) Increasing Income.—The Company will pay a monthly income to the Insured of the amount stated on the first page hereof ($10 per $1,000 face amount of Policy), beginning upon receipt of due proof of such disability and increasing after sixty consecutive monthly payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have been made to twice such amount at which it shall remain while total and permanent disability continues.

"(b) Waiver of Premium.—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability.

"Specified Disabilities.—The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands or both feet or one hand and one foot, will be considered total and permanent disability.

"General Provisions.—The Company may, before making any income payment or waiving any premium, require due proof of the continuance of total and permanent disability, but such proof shall not be required oftener than once a year after such disability has continued for two years. If such proof is not furnished on demand or if it shall appear to the Company that the Insured is no longer totally and permanently disabled, no further income payments will be made or premiums waived.

"Neither the dividends nor the amount payable in any settlement hereof shall be decreased because of Disability Benefits granted.

"If the Insured shall at any time so recover that the payment of Disability Benefits terminates and later shall furnish due proof that he has again become totally and permanently disabled, Disability Benefits shall be the same in

vided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

In October, 1932, respondent filed a bill (afterwards amended) against Stroehmann, the insured, and the beneficiary in the United States District Court, Middle District, Pennsylvania. It alleged that the policy had been obtained upon false and fraudulent misrepresentations and concealments material to the risk. It asked that the Disability Benefits provisions be cancelled, also for an injunction against suit at law upon them.

Relying upon the Incontestability clause the petitioner moved that the bill be dismissed. The trial court sustained the motion, holding that as more than a year had elapsed since the policy took effect the limitation was applicable and controlling. The Circuit Court of Appeals thought otherwise and reversed the challenged decree.

The matter is here by certiorari limited to the question of the application and effect of the Incontestability clause.

No reason appears to doubt the power of the insurer to except from the ordinary Incontestability clause all policy provisions relating to Disability Benefits. Ch. 28, Laws N. Y. (1923); *Steinberg* v. *N. Y. Life Ins. Co.*, 263 N. Y. 45. But the petitioner maintains that the words used in the policy before us are inadequate definitely to disclose a purpose so to do. And we think the point is well taken.

In *Mutual Life Insurance Co. of New York* v. *Hurni Packing Co.*, 263 U. S. 167, 174, this Court said: "The rule is settled that

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amount and subject to the same conditions as if no prior disability had existed.

"If the disability of the Insured shall be the result of insanity, income payments shall be payable to the beneficiary, if any, instead of to the Insured.

"Any disability income payment which may become payable and which is unpaid at the death of the Insured shall be paid to the beneficiary.

"Disability Benefits shall not be granted if disability is the result of self-inflicted injury.

"The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada.

"If requested in writing by the Insured, the Company will terminate the provision for Disability Benefits by endorsement on this Policy.

"If the Insured attains the age of sixty years or if the provision for Disability Benefits terminates, the premiums payable after such age or such termination shall be reduced by the premium for such benefits."

in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it." See *Royal Insurance Co.* v. *Martin*, 192 U. S. 149, 162, 165; *Bergholm, et al.* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 492.

Examination of the words relied upon to show an exception to the Incontestability clause of the policy discloses ample cause for doubt concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion.

The District Court accepted the view approved in *Ness* v. *Mutual Life Ins. Co. of New York* (Fourth Circuit), 70 F. (2d) 59, and *Mutual Life Ins. Co. of New York* v. *Markowitz*, (Ninth Circuit), 78 F. (2d) 396, which presented for interpretation language identical with that now before us. The Circuit Court of Appeals followed its earlier opinion in *N. Y. Life Ins. Co.* v. *Gatti*, (Oct. 6, 1936), where the company employed different language. Certain life companies undertake to make exceptions to the Incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly.

Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt.

The decree of the Circuit Court of Appeals must be reversed. The decree of the District Court is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.